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Supreme Court, U.S.
FILED
OCT 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-565

In The

Supreme Court of the United States

October Term, 1988

HARRY J. COWHERD, M.D., Secretary,
Kentucky Cabinet for Human Resources,

Petitioner,

v.

SAMUEL DOE, by his Mother and Next Friend,
MARY DOE, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

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app

COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHETHER KENTUCKY, CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, CAN COMMIT MENTALLY RETARDED ADULTS TO STATE TREATMENT FACILITIES AND INDEFINITELY CONTINUE THOSE COMMITMENTS WITHOUT ANY IMPARTIAL OR INDEPENDENT REVIEW OF THE APPROPRIATENESS OF THE COMMITMENTS, WHILE PROVIDING SIMILARLY SITUATED MENTALLY ILL ADULTS WITH A COMPREHENSIVE CIVIL COMMITMENT PROCEDURE?

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HARRY J. COWHERD, M.D., Secretary,
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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

The respondents, Samuel Doe and a class of mentally retarded individuals in Kentucky, respectfully request that this Court deny the petition for a writ of certiorari for the reasons stated in this brief. [1]

COUNTER-STATEMENT OF THE CASE

Neither the factual situation which gave birth to this case, nor its subsequent evolution are accurately reflected in the petitioner's statement of the case. Both are necessary to this Court's proper disposition of the petition for certiorari. [2]

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[1] The petitioner, Harry J. Cowherd, M.D., heads the Cabinet for Human Resources, and is the Kentucky official responsible for the administration of the state's four residential treatment centers (RTCs) for mentally retarded individuals. The petitioner and/or the agency are often referred to in this brief as the "Cabinet." The "respondents" include the individual named plaintiff, Samuel Doe, and a certified class of mentally retarded persons in Kentucky.

[2] The correct citation to the reported opinion of the District Court is 668 F. Supp. 597 (W.D. Ky. 1986).

At the start of this lawsuit in 1982, Kentucky had, in the words of the Court of Appeals, a "comprehensive statutory scheme" which governed the civil commitments of both mentally ill and mentally retarded individuals to state treatment facilities. *Ky. Rev. Stat. Ann.* Chapters 202A and 202B (Baldwin 1982); 2a-4a.[3] This statutory scheme provided an array of procedural rights, including the right to counsel, the right to a jury trial, and the right to annual judicial review of the commitment. Individuals also had substantive rights under Kentucky law, including the requirement that a civil commitment could not take place unless (1) the individual presented a danger to self or others, and (2) the hospitalization represented the least restrictive mode of treatment. Furthermore, if the criteria for commitment were no longer met, the individual was entitled to an immediate release. *Id.* These rights in their entirety were made explicitly applicable to mentally retarded persons by *Ky. Rev. Stat. Ann.* § 202B.050 (Baldwin 1982).

Rather than follow these statutory provisions concerning the admission and release of mentally retarded adults from state residential facilities, the Cabinet adopted alternative, informal procedures. 4a-5a.[4] *None*

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[3] References to the Appendix to the Petition for Certiorari are denoted by a page number followed by the letter "a." Citations to the record in the District Court are indicated as "R," followed by the docket number of the document, the name of the document, and the page number, if any.

[4] A separate Kentucky statute, KRS 210.270(3)-(8) (Baldwin 1986 Supp.) is not contested by any party in this case. 3a, n. 2. This statute insures notice of transfers or reclassifications of mentally retarded individuals to such individual's parent or guardian. In addition, the statute establishes a parent or guardian's right to involvement in the evaluation and placement of mentally retarded individuals. Both administrative and judicial review of these decisions is provided, if the parent or guardian disagrees with the

(*concluded on page 3*)

of these informal procedures were reflected in published regulations. R. 35: Fairchild Deposition, 33.

In late 1980, the Cabinet adopted a "parental veto" policy, regarding release from a RTC. Under this policy, a parent could indefinitely block the community placement of his or her adult offspring, indifferent as to whether or not the parent was the legal guardian of the retarded individual concerned. The parental veto operated regardless of the opinion of the Cabinet's own professional staff concerning the appropriateness of the individual release from the RTC. As a result, numerous adult class members remained in RTCs when identified placements outside these institutions existed. R. 114: Answers to Interrogatories, ¶ 4; R. 76: Appendix, 62-63.

In regard to admissions to state mental retardation facilities, the Cabinet adopted a policy by which it characterized virtually every initial placement in a state mental retardation facility as "voluntary." Employing this "voluntary" rubric, the Cabinet bypassed the statutory commitment procedures and adopted an informal admissions process called the Record Review Committee (RRC). The RRC did not use the statutory admissions standards, but instead employed unpublished criteria to determine the mentally retarded individual's "suitability" for admission to an RTC. 4a-5a; 34a. The Court of Appeals summarized Kentucky's system as follows:

(*continued from page 2*)

decision reached concerning placement or classification of the mentally retarded individual. The record below establishes that the Cabinet has fully implemented KRS 210.270 by recognizing and providing for the parents' or guardians' role in all aspects of the admission, evaluation, and release of mentally retarded individuals from RTCs. *See* R. 36: Turner Deposition, Ex. 16, "Statement of Rights of Parents, Guardians, Committees"; and R. 76: Dist. Ct. App., 13-30, "Mental Retardation Facility Discharge Protocol."

> [T]he Cabinet's view has consistently been that admissions under the RRC procedure, initiated by the parent or guardian, are voluntary in nature. Moreover, if the committed person was able to sign the Resident's Bill of Rights form which was presented at admission, by signature or marking an "X", her admission was considered to be voluntary. 5a.[5]

As a result of the Cabinet's RRC policy, during the four years of 1982, 1983, 1984, and 1985, the statutory commitment procedures were used perhaps once in conjunction with an admission to a state RTC. 4a-5a. In contrast, with regard to the mentally ill, Kentucky has employed the statutory civil commitment procedures. Neither the RRC nor any other informal process is interposed in the involuntary civil commitment of a mentally ill adult. R. 36: Turner Deposition, 17, 21-22, 25; R. 37: Draper Deposition, 19-22; R. 66: Kidwell Deposition, 11.

In addition to the civil commitment statutes in *Ky. Rev. Stat. Ann.* Chapters 202A and 202B, Kentucky law provides for the appointment of guardians in Chapter 387. *Ky. Rev. Stat. Ann.* 387.500 *et seq.* Chapter 387 guardianship proceedings were not, in fact, a requirement for the "voluntary" admission of a mentally retarded individual under the Record Review Committee procedure. R. 36: Turner Deposition, 35-36, 39, and 41. Additionally, the Cabinet did not in fact treat Chapter 387 proceedings as a substitute for the civil commitment statutes.[6]

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[5] The form is a three-page, single-spaced document. R. 36: Turner Deposition, Ex. 11.

[6] In one case, the Cabinet employed a civil commitment proceeding to prevent a guardian from removing a resident from a facility.

(*concluded on page 5*)

The individual named respondent, Samuel Doe, filed a lawsuit on behalf of himself and other similarly situated mentally retarded individuals in August 1982.[7] The respondent class sought the benefit of the existing state statutory standards and procedures concerning their commitment to state treatment facilities. The District Court held the parental veto policy unlawful in an opinion dated March 28, 1984. 51a-54a. The petitioner did not appeal this holding to the Court of Appeals and it is not challenged before this Court. 5a, n.3. In most other respects, the District Court did not initially accept the respondent's challenge to the Cabinet's failure to follow Kentucky's statutory commitment procedures to its mentally retarded citizens. 42a-51a.

The District Court reconsidered class members' challenge to Kentucky's admissions practices in an opinion dated January 9, 1986. 33a-41a. In its second opinion, the District Court ruled that in the vast majority of situations, profoundly and severely mentally retarded

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(*continued from page 4*)

R. 36: Turner Deposition, 78. In another case, a division of the Cabinet, the Bureau of Social Services, serving as a guardian of a minor, requested a commitment proceeding because the Bureau was "uncomfortable" with the "voluntary" admissions process used by the division of the Cabinet controlling the Records Review Committee. R. 36: Turner Deposition, 39.

[7] Samuel Doe, born with a condition of mental retardation, was placed at the age of eighteen in the custody of the state officials of the agency which is now known as the Kentucky Cabinet for Human Resources in 1971. Under the authority of the Secretary of CHR he was placed at the Outwood State Hospital in Dawson Springs, Kentucky. R. 76: Mary Doe Affidavit, 2-3; Appendix in Support of Motion for Summary Judgment, 37-38. Several years after Samuel had already been a resident at that institution, he was adjudicated incompetent at the initiation of the state, April 1, 1977, by Christian County Circuit Court. *Id.*, p. 4. No other judicial proceedings occurred before or since with respect to the respondent's admission, continued confinement or release from Outwood. *Id.*

adults had to be considered involuntarily committed. 39a. Observing that Kentucky had "decreed by legislative fiat" that the mentally ill and the mentally retarded were similarly situated in regard to civil commitments, the District Court held that the admissions practices adopted by the Cabinet were a violation of the equal protection clause of the Fourteenth Amendment. 36a-40a. The District Court held that the Cabinet had to begin using existing state statutory standards and procedures for the admissions of mentally retarded adults within sixty days of its order. 40a-41a.

The Kentucky legislature responded to the District Court's second opinion by enacting legislation, effective March 6, 1986. HB 477; 1986 Ky. Acts, Chp. 79 at 162-63. The 1986 amendments stated that the admission of a mentally retarded person to a state facility on the application of a parent *or* guardian with the approval of an interdisciplinary team "shall not be considered an involuntary commitment." 23a. The Court of Appeals stated that "the effect of this amendment was to define most admissions as technically 'voluntary,' without reference to the actual or independent wishes of the person to be committed." 7a.

In response, the class sought a declaration that the 1986 amendments were unconstitutional. The District Court granted relief on November 20, 1986, finding that Kentucky could not, consistently with due process and the equal protection of the laws, deprive mentally retarded adults of a hearing concerning the propriety of their commitment to state facilities. 30a. The court preliminarily enjoined the Cabinet from committing adult class members to state facilities without a judicial civil commitment hearing and granted a partial summary judgment in favor of the class, holding the 1986 amendments unconstitutional. The District Court

gave the parties sixty days to meet and confer concerning the exact contours of relief. 31a-32a.

The Cabinet appealed the grant of the preliminary injunction to the Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1292(a)(1).[8] The Court of Appeals issued an opinion affirming in part and reversing in part on June 15, 1988. 1a-20a.

The Court of Appeals first reviewed the District Court's holding that due process requires a judicial commitment hearing. The Court of Appeals reversed that portion of the District Court's decision which held that due process required a *judicial* commitment hearing, but affirmed the District Court's ruling that the Record Review Committee system did not conform with due process. 10a-16a.

The Sixth Circuit next held that the recognized distinctions between the mentally ill and the mentally retarded were not rationally related to Kentucky's statutory exclusion of mentally retarded individuals from civil commitment procedures. 16a-17a. The Court of Appeals, thus, affirmed the District Court's holding and required judicial hearings for mentally retarded adults "either upon admission, or, if now committed, when they reach adulthood." 17a. The Sixth Circuit then turned to the question of the periodic review of class members' commitment. The court again held that while due process dictated "that *some* periodic review take place during confinement . . . we cannot say that due process requires a periodic *judicial* review." 19a.

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[8] The Cabinet declined to negotiate an agreed system for commitments and, as a result, the class proposed a compliance plan which was adopted by the District Court on June 26, 1987. A partial stay was granted by the District Court regarding individuals admitted to RTCs prior to November 20, 1986. Judicial hearings have been held for class members admitted to RTCs since that date, or who have reached age 18 since that date.

(Citation and text omitted. Italics in original.) With respect to the equal protection analysis, the Court of Appeals held that the acknowledged distinctions between the mentally ill and the mentally retarded did not furnish a valid basis for denying some judicial review procedure for the commitments of the members of the class. 19a-20a. However, the court recognized that "there may be constitutionally valid reasons for providing different methods of periodic review for the mentally retarded and the mentally ill." 19a. The Sixth Circuit ordered a remand to the lower court to resolve in the first instance the questions of exactly how those review procedures may differ from those provided to the mentally ill. 20a, n. 9.

The Court of Appeals denied the Cabinet's petition for rehearing and for rehearing en banc by an order dated August 3, 1988. 21a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY HELD THAT IN KENTUCKY EQUAL PROTECTION REQUIRES A JUDICIAL HEARING PRIOR TO COMMITMENT OF A MENTALLY RETARDED ADULT TO A STATE TREATMENT FACILITY.

1. The Court of Appeals for the Sixth Circuit relied on long-established Supreme Court precedent in holding that, in Kentucky, equal protection requires a judicial hearing to respondents, either upon admission, or, if now committed, when they reach adulthood. *See Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972). The court below started with the oft-repeated precept:

> If a state enacts legislation which treats different classes of people differently, the classification drawn by the statute must be rationally related to a legitimate state purpose. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). 16a.

Prior to the 1986 statutory amendments, Kentucky statutes explicitly provided that mentally retarded persons had the same rights prior to an involuntary commitment as mentally ill persons. By adopting the Record Review Committee process, the Cabinet circumvented the statutory guarantees and labelled all admissions to RTCs as "voluntary." The 1986 amendments "codified" the RRC process and explicitly defined virtually all commitments of mentally retarded persons as "not involuntary," again circumventing the procedures previously guaranteed to the mentally retarded and still provided to the mentally ill.[9]

The Sixth Circuit found no rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment.

> [T]he Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its

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[9] The District Court has twice ruled against the Cabinet, and been affirmed by the Sixth Circuit, on the determination of whether severely or profoundly retarded persons can be "voluntarily" admitted to an RTC upon application of a parent, guardian or other person. *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (W.D. Ky. 1980), aff'd., 674 F.2d 582 (6th Cir. 1982), *cert. den. sub nom Bruington* v. *Conn*, 459 U.S. 1041 (1982). 27a-28a; 10a-12a.

> interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes. 17a. (Emphasis in original.)

2. The petitioner suggests that an adjudication of a mentally retarded adult as incompetent and the appointment of a guardian distinguishes the mentally retarded from the mentally ill for purposes of involuntary commitment. Petition, 11-12. The record establishes that the Cabinet did not, in fact, require a guardianship proceeding under the RRC procedure. The 1986 amendments explicitly permits "parents *or* guardians" to initiate a "voluntary" admission to a RTC, continuing the prior practice of requiring neither a guardianship hearing nor a civil commitment proceeding in the case of mentally retarded individuals. 23a. The Cabinet's statements that "each respondent" has a guardian are thus, factually unsupported and inconsistent with the statute the petitioner seeks to defend before this Court. *See* Counter-Statement of the Case, *supra*, 4. In addition, the terms "parent" and "guardian" are by no means synonymous, with "many retarded adults . . . placed in [RTCs] by state appointed guardians who have no family ties with the mentally retarded person." 11a. *See also* R. 36: Turner Deposition, 40.

3. As a legal matter, jurisdictions considering the issue have held that a guardian does not have the authority to consent to the involuntary commitment of an adult ward. *State* v. *Combined Community Services*, 122 Wis. 2d 65; 362 N.W.2d 104, 116-117 (1985);

In re Hop, 29 Cal. 3d 82; 171 Cal. Rptr. 721; 623 P.2d 282 (1981); *Lippman* v. *Johnson*, 68 Ohio App. 2d 233; 429 N.E.2d 167 (1980); *Von Luce* v. *Rankin*, 588 S.W.2d 445 (Ark. 1979); and *Matter of Guardianship of Anderson*, 17 Wash. App. 690; 564 P.2d 1190 (1977). *See also Leggate* v. *Clark*, 111 Mass. 308, 310 (1873), cited in *Boyd* v. *Board of Registrars*, 368 Mass. 631, 635-636; 334 N.E.2d 629, 632 (1975).

The Cabinet's equal protection argument has been explicitly foreclosed by decisions of this Court so as to leave no question of real importance. The Sixth Circuit's holding that equal protection requires a judicial hearing is grounded upon the similar Kentucky statutory requirements for commitment of the mentally ill. It thus has no impact upon other states. As such, this issue does not warrant this Court's consideration.

II.

THE COURT OF APPEALS, IN DETERMINING WHAT DUE PROCESS REQUIRES PRIOR TO THE COMMITMENT OF A MENTALLY RETARDED ADULT TO A RTC, PROPERLY APPLIED THIS COURT'S DECISION IN *PARHAM* v. *J. R.*, AND IS NOT IN CONFLICT WITH ANY OTHER COURT OF APPEALS.

1. Involuntary civil commitment to a mental institution represents "a massive curtailment of liberty," requiring due process protection. *Vitek* v. *Jones*, 445 U.S. 480, 491-92 (1980); *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972). The Court of Appeals held that the RRC process codified in the 1986 amendments did not meet minimum standards of due process as set out by this Court, particularly in *Vitek* v. *Jones*. The court found significant shortcomings in Kentucky's RRC process.

> Under the current statutory procedure for the involuntary commitment of adults in Kentucky,

> . . . there is no formal mechanism for providing notice, and no method of assuring that the adequacy of notice is related to the time which the potential admittee would require to prepare for the hearing. There is no procedure whereby the admittee may present witnesses or documentary evidence, nor is there a clear opportunity for cross-examination. No independent assistance is allowed by the statute. Moreover, the parent or guardian of the person to be committed is allowed to be a member of the interdisciplinary team, which poses a serious threat to impartiality. 15a-16a.

The 1986 amendments also lack any statutory standard for the "voluntary" admission of mentally retarded individuals, providing that they shall occur "only upon the approval of a physician" after an evaluation of the "physical, emotional, social, and cognitive factors." 24a. This type of "standardless" process falls well below this Court's due process analysis developed in *Parham* v. *J. R.*, 442 U.S. 584, 607 (1979). See *P. F.* v. *Walsh*, 648 P.2d 1067, 1071 (Colo. 1982). In *Parham*, this Court required a neutral decisionmaker that applied a statutory standard and had the authority to implement the decision reached. 442 U.S. at 606-607. The Court of Appeals correctly held that Kentucky's RRC process did not satisfy minimal due process standards.

2. While properly recognizing the serious shortcomings of the Kentucky process, the Court of Appeals reversed the District Court's determination that due process requires a *judicial* hearing before an admission to a RTC can take place. 14a, 16a. In this respect only, the Court of Appeals disagreed with the holding in *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985), aff'd., 794 F.2d 79 (3rd Cir. 1986), *cert. den.* 479 U.S. 962 (1986). The

respondents do not challenge this holding by the Court of Appeals. Following remand, the exact parameters of the relief due to respondents can be determined, fashioned in the first instance by the District Court.

3. The Court of Appeals correctly held that *Parham* v. *J. R.*, 442 U.S. 584 (1979) and *Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), do not control the process that is due to mentally retarded adults prior to an indeterminate commitment to a RTC. The decision of the Sixth Circuit is not in conflict on this point with other sister circuit courts and, in fact, is guided by the Third Circuit's decision in *Clark* v. *Cohen*, 794 F.2d 79 (1986), *cert. den.* 479 U.S. 962 (1986) (and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971).) There, the circuit court affirmed the District Court's holding that:

> . . . *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. 442 U.S. at 602-03; *Clark* v. *Cohen*, 613 F. Supp. at 699. "Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*." *Clark*, 613 F. Supp. at 699.

The court below correctly noted that this Court's decision in *Parham* was rooted in the "unique and traditional relationship shared between parent and child." 13a. In the case of adults, the court held that:

> . . . the decision to commit a person because of mental retardation is, to a large degree, medical in nature. As noted in *Parham*, "neither judges nor administrative hearing officers are better

> qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607. However, "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings. *Vitek* v. *Jones*, 445 U.S. at 495. Although dispensing with an adversary proceeding may be justified in the case of a child, we cannot conclude that adults stand in the same position. 13a-14a.

The Sixth Circuit then looked to this Court's decision in *Vitek* v. *Jones* in determining those procedures which are required to ensure due process. The Court of Appeals properly found that the 1986 statutory "codification" of the informal RRC admissions of mentally retarded adults in Kentucky failed to conform with due process standards as enunciated by this Court. 14a-16a.

4. The Cabinet's argument for certiorari in this case is based upon two faulty premises. The first is that the RRC process codified in the 1986 amendments is consistent with *Parham*. As already shown, the process falls below the standards of both *Parham* and *Vitek* v. *Jones*. The second is that guardianship proceedings provide a sufficient alternative to satisfy due process. In fact, the statute at issue permits "parents *or* guardians" to initiate a "voluntary" admission. A guardianship proceeding is simply not a prerequisite to an admission in Kentucky. Stripped of its niceties, the Cabinet's position is that a procedure lacking any impartial or independent review of the admission and release of mentally retarded adults conforms with due process. Clearly, that is not the case. The decision of the Court of Appeals correctly followed this Court's decisions and that of the Third Circuit in

determining the due process rights of the respondents. This holding by the Sixth Circuit presents no substantial issue worthy of review by this Court.

III.

THE SIXTH CIRCUIT COURT OF APPEALS' HOLDING THAT DUE PROCESS DOES NOT REQUIRE A PERIODIC JUDICIAL REVIEW PRESENTS NO ISSUE.

The Sixth Circuit held that due process does not require a periodic *judicial* review of an involuntary confinement. As the court noted, due process only requires that *some* periodic review take place during confinement, citing *O'Connor* v. *Donaldson*, 422 U.S. 563, 574-75 (1975). 19a. It is irrelevant that the District Court ruled that due process requires some periodic *judicial* review. "It is, of course, the Court of Appeals' judgment that we are called on to review, not the District Court's." *Bowen* v. *American Hospital Ass'n.*, 476 U.S. 610, ___ n. 11 (1986). The petitioner seeks to present this issue to the Court, despite the fact that it prevailed on the issue before the Court of Appeals. The respondents respectfully submit that the petitioner raises no real issue concerning Question 2 of the petition that deserves review by this Court.

CONCLUSION

The petition does not present any question which warrants review by this Court. The Court of Appeals for the Sixth Circuit properly found that due process and equal protection required more than the current statutory procedures for commitment of an adult to a RTC. The holding presents no conflict with the decisions of this Court or the Circuit Courts of Appeal. The

Sixth Circuit ruling is expressly predicated on Kentucky statutes and will affect no others than the litigants. The petition for writ of certiorari should thus be denied.

Respectfully submitted,

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